No. 15,042

IN THE

United States Court of Appeals For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation,
Appellant

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Order of the United States District Court District Court for the Western District of Washington, Northern Division

BRIEF FOR THE APPELLEE

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
A. F. PRESCOTT,
S. DEE HANSON,
Attorneys,
Department of Justice,
Washington 25, D. C.

CHARLES P. MORIARTY,
United States Attorney.

EDWARD J. McCORMICK, JR.,
Assistant United States Attorney.

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OPINION BELOW

The District Court's opinion, entitled "Memorandum Decision" (R. 30-31), is not officially reported.

JURISDICTION

This appeal was taken by the Seattle Association for Credit Men, a corporation, from the order of the District Court entered on January 18, 1956 (R. 31-32),

in an action brought by it against the United States on August 19, 1955, in the court below. The jurisdiction of the court below was claimed by plaintiff-appellant to have been invoked under 28 U.S.C., Section 2410. The order of the District Court was entered on January 18, 1956. (R. 31-32). Within 60 days, and on February 2, 1956, notice of appeal was filed by the appellant. (R. 33.) Bond was filed by the appellant on February 2, 1956. (R. 33-35). The jurisdiction in respect of the appeal is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

The appellant is the assignee of all of the insolvent corporate taxpayer's property for the benefit of unsecured creditors. The assignment was executed on June 2, 1953. On June 15, 1953, following the sale of the taxpayer's assets by the appellant, the Director of Internal Revenue made a levy and demand upon the latter for withholding and employment taxes due and owing by the taxpayer for the calendar quarter ended March 31, 1953.

The question presented is whether the District Court erred in holding that it did not have jurisdiction of this suit praying that the Director's levies be removed from the property so assigned, in which the appellant disclaims any interest.

STATUTE INVOLVED

The pertinent provisions of the applicable statutes involved are printed in Appendix, A, *infra*.

STATEMENT

The pertinent facts gathered from the various pleadings, motions, etc., of the parties involved, as submitted to the court below in this case (R. 4-30), are substantially as follows:[1]

The taxpayer, Western Appliance Company, Inc., on July 1, 1952, while solvent but unable to pay all its bills in the ordinary course of business, made and executed, at the request of its unsecured creditors, to the appellant a chattel mortgage in trust, assigning to the latter "all its property of every kind and description" (R. 10-23), for the purpose of securing an extension of time within which to pay its existing unsecured liabilities (R. 4). The mortgage trust provided, among other things, that the assignment was (R. 12, 15-16)—

> * * * in trust, nevertheless, for the use and benefit of the present unsecured creditors of said mortgagor [taxpayer] * * *.
>
> * * *
>
> * * * said [taxpayer] mortgagor further agrees to pay all taxes and claims * * * which could become a lien against said property and take precedence over this mortgage; and in the event that said mortgagor fails, neglects, or refuses to pay any of the items set forth above in this paragraph as and when they become due, the mortgagee at

[1] While the appellant states that "No facts were in dispute" in the court below (Br. 2), yet it will be noted that some of the allegations as set forth in its complaint are conclusions or in the nature of conclusions (See R. 8-9, for example); hence, we have stated them as allegations, etc., in so far as necessary and appropriate.

> its option may pay the same and the amount thereof shall be added to the amount due otherwise under this mortgage with like interest thereon.

This mortgage was recorded with the Auditor of King County, Washington, on July 3, 1952. The chattel mortgage was given as security for the payment of a promissory note for $22,000 which was dated July 1, 1952. At the same time, the appellant took from the taxpayer an assignment of all its existing and future-accruing accounts, notes and conditional sale contracts receivable.[2] (R. 4, 21-22, 27-28.) The tax payer-mortgagor's "Assignment of Accounts and Notes Receivable" to the appellant on July 1, 1952, also provided, among other things, as follows (R. 22, Ex. B):

> This assignment, however, is in trust for the benefit of the creditors of said [taxpayer] WESTERN APPLIANCE, CO., INC., and is in conjunction with and ancillary to that certain mortgage in trust executed and delivered to the SEATTLE ASSOCIATION OF CREDIT MEN the [1st] day of [July], 1952, and the terms set forth in said trust mortgage are to govern as to distribution of the funds derived hereby.

On June 2, 1953, the taxpayer was insolvent and unable to make payments under the note and trust mortgage, and therefore executed in favor of the appellant a bill of sale of all of the assets covered by the

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[2] This assignment, however, was (R. 28) "subject of course to [the taxpayer's] prior assignments [of receivables] to * * * [the Seattle National Bank of Commerce, University Branch] on account of [conditional sale] contracts pledged for loans" (R. 6, 7, 28), as shown hereinafter.

mortgage in lieu of the foreclosure thereof. (R. 23-27.) This bill of sale was recorded on June 5, 1953, with the Auditor of King County. (R. 5.)

On June 15, 1953, following the appellant's sale of all the the taxpayer's assets, the District Director of Internal Revenue (hereinafter called the Director) made a levy upon the appellant for income withholding and social security (employment) taxes and interest thereon due and owing by the taxpayer in the total sum of $1,632.29 for the calendar quarter ended March 31, 1953, for which a lien had been filed by the United States Government on June 15, 1953, in the amount of $1,339.55, plus penalties and interest. Demand was therewith made upon the appellant for the amount necessary to satisfy those taxes, etc., all of which had accrued after July 1, 1952, the date of the above-mentioned trust mortgage. (R. 5-6.) The appellant answered this levy on July 16, 1953, stating that it had funds in its possession in the sum of $4,176.37, admitting liability with respect to certain of the taxpayer's F.U.T.A. taxes as abated to and due and owing to the United States in the amount of $21.04 (R. 5), and setting forth the existence of the above-mentioned trust mortgage (R. 6).

Before and at the time of the execution of the above trust mortgage on July 1, 1952, the taxpayer had been in the business of selling appliances on conditional sale contracts, and these contracts, previously pledged by the taxpayer for loans, were on the latter date, with full right of recourse, assigned to the Seattle National Bank of Commerce, University Branch (hereinafter called the bank), for collection. The bank, as a part

of this assignment, accumulated a portion of the proceeds of each contract into a fund called a "reserve fund" to secure the bank's contingent liabilities on the conditional sale contracts. No accounts (conditional sale contracts) were assigned by the taxpayer to the bank after the date of the trust mortgage. (R. 6, 27-28).

The appellant notified the bank of the existence of the trust mortgage on or about July 2, 1952, and of the assignment of the accounts receivable. By letter dated March 27, 1953, the appellant advised the bank that the taxpayer, by signed endorsement set forth on the letter, had authorized the bank to pay the entire accumulated "reserve account" directly to the appellant (R. 28) "when the [taxpayer's conditional sale] contracts now in your possession [shall] have paid out * * * ." (R. 27-28). Thereafter, the bank forwarded monthly reports to the appellant on all contracts which had been theretofore assigned by the taxpayer to the bank as pledges for loans, and where defaults occurred on the contracts, the bank required the appellant to repurchase the contracts pursuant to the terms thereof, after which the appellant made its own collections on the contracts. (R. 6-7.)

On June 18, 1953, the Director levied on the University Branch of the bank in the total sum of $1,574.84 for the same taxes secured by the same lien filed on June 15, 1953, above referred to. On July 6, 1953, the bank answered the levy, denying that it held any money or property belonging to the taxpayer, and set forth the interest of the appellant therein. (R. 7.)

All of the contracts covered by the "reserve fund" have now been paid in full, and the bank no longer

claims any interest therein, and is ready to pay the proceeds to whomsoever may be entitled to them, but it has refused to pay the proceeds to the appellant because of the Government's levy. These proceeds now amount to $2,472.68 ($472.68 in cash, and two United States Treasury bonds in the face amount of $1,000 each). (R. 7.)

In connection with the trust mortgage of July 1, 1952, the appellant has received numerous claims in behalf of the unsecured creditors of the taxpayer existing as of July 1, 1952. The total amount of these claims is $21,404.85. To date, the creditors have received on their claims the sum of $2,140.50, and the appellant has on hand, not including the funds now in possession of the bank, the sum of $2,528.06 with which to pay a final dividend to the creditors. More than a year has expired since the Government's levies above-mentioned, and the appellant, allegedly because of the levies, has been prohibited from making any further distribution to the creditors. (R. 8.)[3]

The appellant alleged in the court below that the moneys in its hands and those in the possession of the bank but belonging to the appellant purportedly are not moneys of the taxpayer, and that the appellant, because of the Director's levies, allegedly has been prohibited for more than a year from disposing of such moneys and will continue to be so prohibited unless the levies are released or disposed of. (R. 8-9.) The appellant, through its attorneys, has on numerous occasions requested the Director and his advisory counsel to release the levies but on each and every

[3] See fn. 1, *supra*.

occasion the latter have refused to do so, despite the fact that the taxpayer allegedly has no interest whatsoever in any of the funds above referred to. (R. 8.)[4]

The levies in question purportedly constitute a cloud upon the title of the appellant to the funds in its and the bank's hands. The Government has made no effort to seize the property in the hands of the appellant and the bank, nor has it made any attempt to collect the taxes underlying the levies in question; rather the Government, allegedly, has consistently refused to permit the appellant to adjudicate the question of its right to such funds. (R. 9.)[5]

Upon a consideration of the foregoing facts and/or allegations, the District Court, pursuant to the Government's motion (R. 29-30), entered its order of dismissal of the appellant's suit for lack of jurisdiction on January 18, 1956 (R. 31-32). From the order so entered, the appellant appealed to this Court for review. (R. 33.)

SUMMARY OF ARGUMENT

1. The appellant's contention that the District Court had jurisdiction in this case under 28 U.S.C., Section 2410, is without merit. That section is merely a consent of the United States to be sued in a proper action—one to quiet title to or for the foreclosure of a mortgage or other lien upon property on which the United States has or claims a mortgage or other lien. The section does not confer jurisdiction over the United States upon the Federal District Courts, but is merely

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[4] See fn. 1, *supra*.

[5] See fn. 1, *supra*.

a consent to be sued in a suit in which the district court already has jurisdiction otherwise independently of that section. Further, the appellant cites no case, and we find none, which holds that the section is operative in a suit where the plaintiff disclaims any right in the property involved, as here.

Moreover, the purpose of the instant suit is no different from that of the former suit (134 F. Supp. 439) which was brought by the appellant in connection with the same property, and in which the District Court held that it had no juridiction on the ground that the suit for injunctive relief there was prohibited by Section 7421 of the Internal Revenue Code of 1954. Section 7421 prohibits suits instituted for the purpose of restraining the assessment or collection of any federal tax. In this connection, it should be noted that there is no showing here by the appellant that its remedies at law are inadequate. Because of the appellant's refusal to pay upon levy and demand, the United States will probably be required to bring suit against it, asserting the penalty under Section 3710 of the Internal Revenue Code of 1939 (now Section 6332 of the 1954 Code) for failure to pay, in which suit the appellant could then, as adequate remedy at law, assert as a defense the question at issue which it now seeks to have decided here. Nor is it clear that the appellant could not pay the tax and sue to recover upon the grounds alleged here.

Neither has the appellant demonstrated that it was not possible for the Government to have acquired a lien prior to the corporate taxpayer's assignment of all its property to appellant. Further, the voluntary

assignment to appellant by the insolvent taxpayer of all its assets for the benefit of its unsecured creditors thereupon brought Section 3466 of the Revised Statutes into play, showing that the Government, under controlling authority cited hereinafter, is thereby entitled to priority in payment of the taxes due and owing the United States by the taxpayer.

All of the cases cited by the appellant here—except one in which the facts are different and which in any event we submit is erroneous (dealt with hereinafter) —involved the question of whether property upon which a collector had distrained was property of the taxpayer, or was property of another. None involves the question presented in the instant case, namely, whether the United States is entitled to be first paid from property of the insolvent corporate taxpayer, all of which it has voluntarily assigned to another for the benefit of unsecured creditors. In other words, the appellant's obvious purpose in bringing this suit is merely to try out and determine the priorities in respect of the property of the taxpayer. There is a marked difference, however, between a suit to determine the ownership of property, upon which a levy has been made and one where, as here, the appellant is requesting this Court to decide the relative priorities of a claim for federal taxes and the adverse claims of individuals.

2. In addition, from the jurisdiction of the federal courts to render declaratory judgments under the statute hereinafter cited, judgments with respect to federal taxes are specifically excepted. Nor did the District Court have jurisdiction under the several other

provisions of the statute, cited and relied on by the appellant and dealt with *infra*. If the court below had jurisdiction under those sections, then it would have had jurisdiction to enjoin the collection of internal revenue taxes, which is strictly prohibited by the Internal Revenue Code, as well as jurisdiction to declare judgments in respect of federal taxes which, as pointed out, is distinctly excepted from the statute providing for declaratory judgments.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN GRANTING THE GOVERNMENT'S MOTION TO DISMISS FOR WANT OF JURISDICTION

The sole question presented is whether the District Court erred in granting the Government's motion to dismiss and holding that it did not have jurisdiction of this suit, brought under 28 U.S.C., Section 2410 (Appendix A, *infra*), and praying that the Director's levies be removed from the insolvent taxpayer's property which it assigned to the appellant for the benefit of its unsecured creditors and in which the appellant disclaims any interest. The appellant contends that the District Court erred in so holding (Br. 2), arguing that the statutes of the United States, particularly Section 2410, grant to the federal courts jurisdiction to try quiet-title actions to funds in the hands of a third party, other than the taxpayer, which have been levied upon as the taxpayer's property pursuant to liens filed against the taxpayer (Br. 2-13). We submit that these contentions are without merit.

A. The District Court Was Without Jurisdiction Under 28 U.S.C., Section 2410

The statute relied on by the appellant (Br. 2-3) in the instant action (28 U.S.C., Section 2410(a),[6] provides in pertinent part as follows:

> Sec. 2410. *Actions affecting property on which the United States has lien*
>
> (a) Under the conditions prescribed in this section * * * the United States may be named a

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[6] Since the appellant, in its quotations (Br. 3), has confused and intermingled the provisions of this statute with those of the original 28 U.S.C., Section 901, we quote the predecessors to 28 U.S.C., Section 2410, which provided as follows:

Act of March 4, 1931, c. 515, 46 Stat. 1528, provided in pertinent part that—

> * * * upon the conditions herein prescribed for the protection of the United States, the consent of the United States be, and is hereby given, to be named a party in any suit which is now pending or which may hereafter be brought in any United States district court * * * for the foreclosure of a mortgage or other lien upon real estate, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises involved.

The Act of March 4, 1931, c. 515, 46 Stat. 1528, as amended by the Act of December 2, 1942, c. 656, 56 Stat. 1026 (original 28 U.S.C., Section 901) provided in pertinent part that—

> Section 1. Upon the conditions herein prescribed for the protection of the United States, the consent of the United States is given to be named a party in any suit which is now pending or which may hereafter be brought in any United States district court, * * * and in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises or personal property involved.

> party in any civil action or suit in any district court, * * * or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.
>
> * * * * *

In the first place, it is an established rule of jurisprudence that the United States may not be sued without its consent. *United States* v. *Clarke,* 8 Pet. 436, 443-444; *Lynch* v. *United States,* 292 U.S. 571, 581; *Dismuke* v. *United States,* 297 U.S. 167, 171-172. Suits for the recovery of taxes may be maintained against the Government only under such conditions and subject to such limitations as Congress may prescribe. *Collector* v. *Hubbard,* 12 Wall. 1; *Cheatham* v. *United States,* 92 U.S. 85; *Rock Island, &c., R.R.* v. *United States,* 254 U.S. 141; *United States* v. *Michel,* 282 U.S. 656; *United States* v. *Jefferson Electric Co.,* 291 U.S. 386; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337. It is settled that "An action may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel, supra,* p. 659; *Rock Island, &c., R.R.* v. *United States, supra,* p. 143.

Next, as to the relief sought by the appellant here under 28 U.S.C., Section 2410 (R. 9; Br. 2-3), we submit that, contrary to its contentions (Br. 2, 7, 13-16), the court below correctly held that it was without jurisdiction (R. 30-31), just as it had held on the same facts in the prior suit brought by the appellant to try out the priorities in respect of the property of

the same insolvent taxpayer (134 F. Supp. 439; see also Affidavit of Thomas R. Winter, Appendix B, infra).[7] The court, in concluding that the instant action must be dismissed for want of jurisdiction, held that a reading of Section 2410 in its entirety discloses that the consent to suit by the United States referred to therein is limited to situations involving judicial sales. (R. 30-31.) It cited in support thereof *Metropolitan Life Ins. Co.* v. *United States,* 107 F. 2d 311 (C.A. 6th), certiorari denied, 310 U.S. 630; *Miners Sav. Bank of Pittston, Pa.* v. *United States,* 110 F. Supp. 563 (M.D. Pa.); *Borough of Kenilworth* v. *Corwine,* 96 F. Supp. 68 (N.J.); *Bank of America National T. & S. Ass'n* v. *United States,* 84 F. Supp. 387 (S.D. Cal); and *Integrity Trust Co.* v. *United States,* 3 F. Supp. 577 (N.J.); (see also *Ford Bros. & Co.* v. *Eddington Distilling Co.,* 30 F. Supp. 213 (M.D. Pa.)). An examination of these decisions discloses that, contrary to the taxpayer's attempted distinctions here (Br. 4-7), the court below properly held that they are more consistent with the language

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[7] This affidavit (together with the District Court's opinion handed down April 29, 1955, in the appellant's first action, No. 1840, reported in 134 F. Supp. 439) constitutes an integral part of the Government's motion to dismiss which is contained in the record on appeal, as transmitted by the Clerk of the District Court to the Clerk of this Court (R. 36), and was designated by the appellant in its designation of contents of record (Item No. 2) for inclusion in the printed record upon appeal. Hence, it is a proper part of the record upon appeal. Since the appellant apparently inadvertently failed to include the affidavit in the printed record, however, we have printed it in Appendix B, *infra,* for the convenience of the Court. The District Court's opinion above referred to, now being officially reported, has been omitted from Appendix B.

of the statute and its legislative history than is the single decision (*Adler* v. *Nicholas,* 166 F. 2d 674 (C.A. 10th)), holding otherwise (R. 30-31)—which we submit is clearly distinguishable, as shown hereinafter.

Whether or not the appellant agrees with the reasons assigned by the District Court for its decision here (R. 30-31), it is clear that the conclusion reached —that it was without jurisdiction under Section 2410 —is correct, nor has the appellant shown it to be in anywise wrong. Section 2410 is merely a consent on the part of the United States to be sued in a proper action, that is, as shown, in an action to quiet title to or for the foreclosure of a mortgage or other lien upon property on which the United States has or claims a mortgage or other lien. Since the relief afforded by that section is incidental and not primary, it is clear that consent to be sued thereunder may not properly be invoked as giving jurisdiction to the District Court over the United States in a situation where, as here, jurisdiction is not already otherwise granted independently of that section. This Court and others have so held. *Wells* v. *Long,* 162 F. 2d 842, 843 (C.A. 9th); *Bristow* v. *Hanset Lumber Co.* (Ore.), decided June 17, 1953 (1953 P-H, par. 72, 650); *Haldeman* v. *United States,* 93 F. Supp. 889 (Mich.). Nor, as this Court said in the *Wells-Long* case (p. 843), can federal jurisdiction under Section 2410 be predicated merely on the fact that the United States is named a party to the suit, as here. Further, the appellant cites no case, and we find none, which holds that Section 2410 is operative in a suit where the plaintiff disclaims any right in the property involved, as here.

In the *Wells-Long* case, appellant Wells brought an action, under former Section 901 of Title 28 U.S.C., as amended by the Act of December 2, 1942, c. 656, 56 Stat. 1026, *supra*—the predecessor of 28 U.S.C., Section 2410, *supra*, here involved—against the United States and another (one Mrs. Long) to quiet title to certain lands conveyed by the latter to the United States, and the appellees urged that the United States had not by that statute waived its immunity from suit to quiet title to the land which it claimed to own in fee. The appellees cited the legislative history—as relied on by the District Court here (R. 30-31, Br. 3)—of the 1942 amendment to Section 901, on which appellant Wells there relied, and called (p. 844) this Court's attention to—

> the restrictive verbiage of the Act, particularly the provision limiting the waiver of immunity to suits "for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises or personal property involved." [This Court stated that] *The interpretation* [*thus*] *urged seems on the face of things to be well grounded,* but we refrain from deciding the point since we are of [the] opinion that the court below was without jurisdiction to entertain the suit. [Italics supplied.]

Likewise here, the same legislative history of the 1942 amendment to Section 901 (S. Rep. No. 1646, 77th Cong., 2d Sess., pp. 1-3),[5] as referred to by this Court

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[5] Clearly showing that the appellant's case does not come within the provisions of the 1942 amendment, 28 U.S.C., Section 901, or

in the *Wells-Long* case (p. 844), and cited by the appellant here in respect of the successor (Section 2410) to the 1942 amendment (Br. 3-4), together with the restrictive terminology of Section 2410(a), particularly the provision limiting the waiver of immunity to suits "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien," fully supports our position and the District Court's decision that the United States has not, by Section 2410(a), waived its immunity to the appellant's suit ostensibly to quiet title to the funds here in question, but in substance and fact to try out and determine the priorities in respect of the insolvent taxpayer's property. Nor has the appellant shown—though required to do so under the rule

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its successor, 28 U.S.C., Section 1240(a), here involved, are the following pertinent excerpts from S. Rep. No. 1646, p. 1:

* * *

> The purpose of the bill is to permit the United States to be made a party defendant in cases involving foreclosure of mortgages or liens on personal property and to provide a method to clear real-estate titles of questionable or value-less Government liens.
>
> In recent years there have been thousands of mortgages and similar liens on crops, livestock, farm equipment, and other personal property give as security for loans. Under existing law the United States has consented to be a party to suits for the foreclosure of mortgages or other liens on real estate, in order to obtain adjudications concerning any mortgages or liens that the United States may have, or claim, on such real estate. It appears reasonable and proper that the holder of a mortgage or lien on personal property should have the same right to an adjudication concerning a mortgage or lien on personal property as is accorded to the holder of a mortgage or lien on real estate.

enunciated by this Court in the *Wells-Long* case (p. 844)—that the District Court in which the instant action, as well as the preceding one, was "brought has jurisdiction thereof on grounds independent of the statute [Section 2410(a)]". Accordingly, as this Court held in the *Wells-Long* case (p. 844), in the absence of the United States' invoking the jurisdiction of the District Court, and it has not done so here, federal jurisdiction can not be established merely on the fact that the appellant named it as party defendant in the court below. (R. 3.)

Moreover, it is clear that the appellant's real purpose in the instant action (No. 3992)—essentially to try out and determine the priorities in respect of the property of the insolvent taxpayer—is substantially and in effect no different from that of its former suit (Civil No. 1840). The latter was brought by the appellant in connection with the same property which had been assigned to it by the same taxpayer, and in which the court below held that it had no jurisdiction on the ground that the suit for injunctive relief there was prohibited by Section 7421 of the Internal Revenue Code of 1954 (Appendix, *infra*). See *Seattle Association of Credit Men* v. *Frank*, 134 F. Supp. 439, 440 (W.D. Wash.), decided April 29, 1955.[9]

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[9] Within ten days after the District Court's order of dismissal of the first action entered on April 29, 1955, without granting the appellant leave to plead over, the appellant filed an amended complaint (Civil No. 1840) naming, in addition to the Director, the United States also as a party, and praying, in addition to the injunctive relief sought in the first complaint, alternative relief under 28 U.S.C., Section 2410, as here. Since the amended complaint was obviously no less vulnerable for lack of jurisdiction than the original complaint, the Government filed a motion to

Section 7421 prohibits suits instituted for the purpose of restraining the assessment or collection of any federal tax. In this connection, it should be noted that there is no showing by the appellant that its remedies at law are inadequate. And because of the appellant's refusal to pay upon levy and demand, the United States probably will be required to bring suit against it and the bank, asserting the penalty provided by Section 3710 of the Internal Revenue Code of 1939 (Appendix A, *infra*), for their failure or refusal to have paid upon notice and demand. In such suit the defendants could then assert as a defense the question at issue which the appellant seeks to have decided here. This would constitute an adequate remedy at law for the appellant, and would,

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dismiss on August 5, 1955, and the appellant, before the Government had filed and served its answer to the amended complaint, thereupon filed on August 16, 1955, notice of dismissal of the amended complaint (see affidavit, Appendix B, *infra*). Three days later, and on August 19, 1955, the appellant filed the instant action under 28 U.S.C., Section 2410, naming only the United States as the party defendant. (R. 3-28.)

In these circumstances, it is arguable that the District Court was without jurisdiction here for the additional reason that its order of dismissal in the former action, brought by the same plaintiff against the same defendant and/or defendants—in privity with the defendant in the instant action (Section 7422(c) of the Internal Revenue Code of 1954)—and involving the same taxpayer, taxes and taxable period, is *res judicata* upon the present action. *Cromwell* v. *County of Sac,* 94 U.S. 351; *Jeter* v. *Hewitt,* 22 How. 352; *Hopkins* v. *Lee,* 6 Wheat. 108; *Northern Pacific Railway* v. *Slaght,* 205 U.S. 122, 132; *Manhattan Trust Co.* v. *Trust Co. of North America,* 107 Fed. 328, 332 (C.A. 8th); *Art Metal Construction Co.* v. *United States,* 82 C. Cls. 666; *Foster* v. *The Richard Busteed,* 100 Mass. 409; *Putnam* v. *Clark,* 34 N.J. Eq. 532; compare *Gillespie* v. *Commisioner,* 151 F. 2d 903 (C.A. 10th); and *Leininger* v. *Commissioner,* 86 F. 2d 791 (C.A. 6th).

of course, bar action in a court of equity seeking results in the nature of injunctive relief, as here. *Mercantile Trust Co.* v. *Hofferbert,* 58 F. Supp. 701, 706-707 (Md.). Neither is it clear, nor has the appellant shown, that it could not pay the taxes in question and sue to recover upon the grounds alleged here or perhaps others, under 28 U.S.C., Section 1340 (Appendix A, *infra*), as, indeed, it tacitly concedes it could. (Br. 12-13.)[10]

Neither has the appellant demonstrated that it was not possible for the Government to have acquired a lien prior to the corporate taxpayer's assignment of all its property to it. In fact, the voluntary assignment to the appellant by the insolvent taxpayer of all its assets for the benefit of its unsecured creditors (R. 5, 23-27) thereupon automatically brought Revised Statutes, Section 3466 (Appendix A, *infra*) into play,

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[10] Contrary to the appellant's contention that it "cannot pay the tax and sue for a refund as there is no provision in the law for such procedure" (Br. 15), it is clear that 28 U.S.C., Section 1340, authorizes such suit, as the appellant itself shows (Br. 12-31). But the record shows that the appellant could pay the taxes in question out of the taxpayer's funds in its possession, and collect the amount thereof, plus interest, apparently without suing therefor. Thus, the appellant is specifically authorized "to pay all taxes * * * which could become a lien against [the taxpayer's] said property" assigned to the appellant under the mortgage trust on July 1, 1952 "in the event that said [taxpayer] mortgagor fails, neglects, or refuses to pay [them] * * * as and when they become due * * * and the amount thereof shall be added to the amount due [appellant] otherwise under this mortgage with like interest [6% (R. 13)] thereon" (R. 15-16). And this was confirmed and ratified by the taxpayer's assignment of its accounts and notes receivable to the appellant on July 1, 1952, "in conjunction with and ancillary to that certain mortgage in trust executed and delivered to the" appellant on that date. (R. 22.)

showing that the United States is thereby entitled to priority in payment of the taxes due and owing it by the taxpayer here (R. 5-6, 7). *Price* v. *United States,* 269 U.S. 492, 502-503; *Stripe* v. *United States,* 269 U.S. 503; compare *United States* v. *Butterworth Corp.,* 269 U.S. 504, 513-514. In the *Price* case, the Supreme Court held (pp. 499, 500, 502) that—

> The word "debts" as used in R.S. § 3466 includes taxes.
>
> * * *
>
> * * * § 3466 is to be construed liberally.
>
> * * *
>
> When the [defendant's] assets turned out to be less than the debts, the creditors were entitled to have them dealt with as a trust fund and distributed among them according to their rights and priorities. Under the statute, claims of the United States must first be satisfied.

All of the cases cited by the appellant here—except one (*Tomlinson* v. *Smith,* 128 F. 2d 808 (C.A. 7th)), which is distinguishable and dealt with hereinafter—involved the question of whether property upon which a collector had distrained was property of the taxpayer, or was property of another. None involves the question presented in the instant case, namely, whether the United States is entitled to be first paid from property of the insolvent corporate taxpayer, all of which it has voluntarily assigned to another for the benefit of unsecured creditors. In other words, the appellant's obvious purpose in bringing this second suit is merely to try out and determine the priorities in respect of the property of the taxpayer. Needless

to say, there is a marked difference between a suit to determine the ownership of property upon which a levy has been made and one where, as here, the appellant is asking this Court to decide and resolve the relative priorities of a claim for federeal taxes and the adverse claims of individuals.

The appellant, without actually showing in anywise that the District Court's decision is wrong, and without citing any cases, and we are able to find none, holding that Section 2410 is operative in a suit where the plaintiff disclaims any right in the taxpayer's property involved, as here, nevertheless attempts (Br. 4-7) to distinguish the several cases cited and relied on by the Government and followed by the court below (R. 30). The appellant relies heavily (Br. 9-10) on the Tenth Circuit's decision in *Adler* v. *Nicholas*, 166 F. 2d 647, which, as pointed out, the District Court, upon a thorough consideration, declined to follow on the ground that the several other decisions cited and relied on by the Government are more consistent with the language of the statute (Section 2410) here involved and the legislative history thereof (R. 30-31). We submit that the District Court correctly so concluded, and that the *Adler-Nicholas* case is clearly distinguishable. There the husband and wife were partners in their jewelry business, and the assessments were against the husband individually and against his wife individually. The Court held that as to the interest of the partners in the net proceeds of the partnership, if any, and the interest of the outside party (one Mrs. Evans) in the assets of the partnership as subrogee of the rights

of the creditors, they had such an interest in the partnership property as would permit them to maintain the action there to enjoin the Government from selling the property in violation of their rights therein. The court held (p. 679) that "As to such property, they were not taxpayers" for—

> They stand in the relationship of third parties claiming an interest in property which the Government asserts a right to sell to satisfy an income tax liabiliy of another, and could, therefore, maintain this action to establish their rights, if any, therein.

The court had theretofore stated (pp. 678-679) that—

> One other principle must be kept clearly in mind before we go to a consideration of the precise question in this appeal. A partner's interest in the partnership property is his share of the surplus after all partnership debts have been paid, and that surplus alone is liable for the separate debts of each partner. It, therefore, must follow that the partnership creditors' claims must first be satisfied out of the partnership assets before there was any distributable surplus to the partners to which the Government could look for the satisfaction of the individual tax liability of the partners, and even then it would be limited in its attempt to collect the income taxes due from each partner to his interest in the remaining net proceeds of the partnership.
>
> What we have said as to income taxes does not apply to the Government's claim for excise taxes. These arose by virtue of partnership sales and as to them the Government would have a claim

against partnership assets, and, of course, could perfect a first and prior lien thereto. We do not understand that any of the parties contest the right of the Government to look at the partnership assets for the satisfaction of its excise tax claim.

Substantially to the same general effect is *Jones* v. *Tower Production Co.*, 138 F. 2d 675 (C.A. 10th), decided November 11, 1943,[11] likewise erroneously relied on by the appellant (Br. 5, 8-9), which is also distinguishable. There the court, deciding for the Government, held that the suit for an injunction restraining the collector from levying on the corporate taxpayer's property (oil leases) to satisfy an assessment against the United States where the real question in issue was whether or not the United States ever had a valid lien on such property, and thereupon reversed and remanded for the purpose of bringing the United States in as a party defendant. Thus, the

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[11] There were two other Tower Production Co. cases: *Jones* v. *Tower Production Co.*, 120 F. 2d 779 (C.A. 10th), and *Tower Production Co.* v. *United States*, 61 F. Supp. 411 (W.D. Okla.), decided on May 28, 1941, and July 2, 1945, respectively. In the former, the Tenth Circuit decided in favor of the Government and dismissed the taxpayer's complaint wherein it had sought to be adjudged the owner of the oil property in question, which was subject to a United States tax lien, on the ground that there was neither allegation nor proof of compliance with Section 3679 of the 1939 Code (re civil actions to clear title to realty). In the latter, it finally developed that the District Court, adhering to its previous decision in the same action (45 F. Supp. 593, decided June 27, 1942)—which, as pointed out, had been reversed and remanded (138 F. 2d 675, *supra*)—restrained the collector from prosecuting distraint against the property *not* belonging to the taxpayer for the taxes of another.

critical question there was who was the owner of the disputed property, and the question was resolved by the court's restraining the collector from distraining on the property in question, which did not belong to the taxpayer, for the taxes of another. Hence, it will be seen that that case, and also the *Adler-Nicholas* case, *supra*, both involved the question, as pointed out, whether the property upon which the collector had distrained was property of the respective taxpayers, or the property of others, and that neither involved the question presented here, as pointed out—whether the United States is entitled to be first paid from the insolvent taxpayer's property, all of which it voluntarily assigned to the appellant for the benefit of creditors.

The appellant further cites such cases as *Jones* v. *Kemp*, 144 F. 2d 478 (C.A. 10th), and *Tomlinson* v. *Smith*, 128 F. 2d 808 (C.A. 7th), for example, for the proposition that despite the statutory prohibition against the issuance of injunctions to restrain the collection of federal taxes, some courts "have by-passed the statutes and held them inapplicable", thereby permitting suits by third parties to enjoin the collector from levying on property belonging to a third party to satisfy the tax liability of another. (Br. 7-8.) Those cases are distinguishable. Thus, the *Tomlinson-Smith* case, in which the facts are different and which in any event we submit was erroneously decided, is, as pointed out, the single exception to all the other cases cited by the appellant involving the question whether the property upon which a collector had distrained was the property of

the taxpayer or of others, which, as shown, is not the question involved here. In that case, the Seventh Circuit upheld the District Court's order restraining the Government from issuing or serving any warrant or notice of distraint upon the taxpayer's debtor-customers to collect from them delinquent social security taxes of the taxpayer. It was alleged that the Collector's action in thus harassing the customers threatened to destroy the taxpayer's business and, in such circumstances, the court held that the taxpayer was without an adequate remedy at law. That this case is not applicable to the facts here is shown by the action of the District Court in the appellant's first suit in *Seattle Association of Credit Men* v. *Frank,* 134 F. Supp. 439 (W.D. Wash.), involving the same facts as here. (See Appendix B, *infra.*) There the court below, denying the injunctive relief sought by the appellant and following this Court's decision in *Matcovich* v. *Nickell,* 134 F. 2d 837, 838, in respect of the adequacy or inadequacy of a remedy at law, stated (p. 440):

> The allegations of the complaint in this case do not show an inadequate remedy at law. The showing of inadequacy in *Tomlinson* v. *Smith,* 7 Cir., 128 F. 2d 808 was much stronger than the allegations in the present case. Moreover, the portion of the 7th Circuit opinion dealing with inadequacy of law remedy is not overly persuasive when applied to the facts of the present case.

Hence, we submit that the *Tomlinson-Smith* case, involving different facts, is not only distinguishable but also in any event is wrong.

In *Jones* v. *Kemp, supra,* the Tenth Circuit, holding that homesteads, not being specifically exempt under federal law, are subject to distraint for collection of delinquent taxes regardless of exemptions granted by State law, recognized that while injunctive relief may be granted to protect the interest of third parties in property against which the Collector is proceeding, yet it found from the evidence there that the taxpayer's common law wife—whose illegitimate and unlawful relationship with her putative "husband" had not ripened into a legal marriage under local law prior to the tax lien—had no vested homestead interest in the property at the time the lien attached, and therefore it denied the injunction sought. This case was also distinguished by the court below in the appellant's first suit involving the same facts as here, *supra* (see Appendix B), and upon denying the injunctive relief sought by the appellant there, the court stated as follows (p. 440):

> Undoubtedly, the owner of property may maintain a suit to restrain a levy on his property to satisfy tax liability of others who have no interest in the property under the conditions stated in *Jones* v. *Kemp,* 10 Cir., 144 F. 2d 478. Such situation is not presented in the instant case, even with respect of the funds held by the National Bank of Commerce branch bank. The contracts originally were assigned to the bank for collection. At that time the taxpayer was the owner of the contracts. The complaint alleges that thereafter all ownership and interest in the proceeds of collection of the contracts was fully and finally divested from the taxpayer. It may be so but that

> issue ought not to be adjudicated in an action for injunctive relief in view of the imperative provision of Section 7421 I.R.C. against enjoining collection of internal revenue taxes.

Hence, the *Jones-Kemp* case, as pointed out, comes within the same category of the appellant's other cases involving the question whether the property distrained upon by the Collector was the property of the taxpayer or that of another, and not the question here presented.

As to the Government's cases relied on by the District Court in deciding the instant case (R. 30), it will be noted that the appellant emphasizes and treats two of them (*Metropolitan Life Ins. Co.* v. *United States,* 107 F. 2d 311 (C.A. 6th), and *Integrity Trust Co.* v. *United States,* 3 F. Supp. 577 (N.J.)), as being inapplicable to the facts here because they were decided before the 1942 amendment to the Act of March 4, 1931, *supra* (Br. 4, 5). But the later case of *Borough of Kenilworth* v. *Corwine,* 96 F. Supp. 68 (D.C. N.J.), decided on March 7, 1951, long after that amendment, which the appellant has been unable to distinguish (Br. 5), and where the same District Court of New Jersey followed its previous decision in the *Integrity Trust Co.* case, fully negatives the appellant's contention of inapplicability of the latter here. In the *Borough of Kenilworth* case, the District Court, holding that the action must be dismissed because the jurisdictional requirements of 28 U.S.C., Section 2410 (involved here), had not been met, stated (p. 69):

> Plaintiff instituted this action in the Superior Court of New Jersey, seeking strict foreclosure of fifteen tax sale certificates. The United States having removed the action to this court under the provisions of section 1444 of the Judicial Code, 28 U.S.C.A. § 1444, moves to dismiss on the ground that the jurisdictional requirements of Title 28 U.S.C.A. § 2410, are not met.
>
> Under a statute formerly in effect, substantially similar to that embodied in 28 U.S.C.A. § 2410, Judge Avis of this court held that consent to be sued in a strict foreclosure proceeding had not been given by the United States, since the statute contemplated a judicial sale. *Integrity Trust Co.* v. *United States,* D.C. N.J., 1933, 3 F. Supp. 577. The United States, of course, cannot be made subject to suit unless the terms of its consent are strictly complied with. It follows, therefore, that this action must be dismissed as to the United States, * * *.

In *Miners Sav. Bank of Pittston, Pa.* v. *United States,* 110 F. Supp. 563 (M.D. Pa.), in which the bank brought an action to quiet title to property against which the United States had a recorded income tax lien, the court held (pp. 571-572) that the bank had another remedy under 28 U.S.C., Section 2410(a), pursuant to which, under the predominant authorities (p. 571, fn. 24),[12] "the court could grant no relief

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[12] These comprised the following cases: *Metropolitan Life Ins. Co.* v. *United States,* 107 F. 2d 311 (C.A. 7th), certiorari denied, 310 U.S. 630; *Integrity Trust Co.* v. *United States,* 3 F. Supp. 577 (N.J.) and *Borough of Kenilworth* v. *Corwine,* 96 F. Supp. 68 (N.J.), all followed by the District Court here (R. 30); and also *Sherwood* v. *United States,* 5 F. 2d 991, 993 (E.D. N.Y.); *Fox* v.

except to order a sale". As against this, the court stated (pp. 571-572, fn. 24, par. 2) "The other [minority] view"[13] whereby it was purportedly not required to order a sale *when the value of the property is insufficient to satisfy even the private lienor, much less the tax lien,* but may in such case order cancellation of the tax lien. In this connection, the court stated (p. 572):

> * * * we see no good reason why this court, as a court of equity, should not exercise its power by finally establishing the legal relations of the parties to the property in question, although this is the first case, so far as our research has revealed, to grant such relief since the 1942 amendment. *Cf. Bank of America Nat'l Trust & Saving Ass'n* v. *United States, supra.* Such a conclusion is not only supported by the foregoing but rests upon sound principles of remedial justice.

Queens County Sales Co., Inc., 52 F. 2d 794, 795 (E.D. N.Y.); *Ormsbee* v. *United States*, 23 F. 2d 926 (Fla.); *Ford Bros. & Co.* v. *Eddington Distilling Co.*, 30 F. Supp. 213 (M.D. Pa.).

[13] The three cases—two by way of comparison—cited by the District Court as representing "The other [minority] view" comprises the following: *Oden* v. *United States*, 33 F. 2d 553 (W.D. La.); and cf. *Trust Co. of Texas* v. *United States*, 3 F. Supp. 683 (S.D. Texas); *Minn. Mut. Life Ins. Co.* v. *United States*, 47 F. 2d 942 (N.D. Texas). An examination of the *Oden* case, for example, however, discloses that all it held was that a mortgagee first in right could prevent a sale of the property involved, and in lieu thereof obtain a decree ordering the cancellation of the Government's tax lien in so far as it rests upon or affects title to the particular property only, but that it should remain of record against any other property of the tax debtor. The other two cases are substantially to the same effect.

The District Court thereupon ordered the entry of a decree consistent therewith. It is not clear, however, how the latter result supports the appellant's rather than the Government's position because "no judicial sale was found necessary", as the appellant claims (Br. 7), for to have done otherwise under the circumstances there would, as the District Court itself put it (p. 571, fn. 24), have been "a vain and useless thing." Moreover, an examination of the so-called minority view decisions cited by the District Court there (p. 571-572) do not stand for what it claimed therefor. (See fn. 13, *supra.*)

B. The District Court Did Not Have Jurisdiction Under 28 U.S.C., Sections 1340, 1346(a)(2) and/or 2463

The appellant, having relied solely on 28 U.S.C., Section 2410, in the District Court (R. 49), now invokes additionally for the first time upon appeal the provisions of 28 U.S.C., Section 1340, 1346(a)(2) and/or 2463 (Appendix A, *infra*), as bearing on jurisdiction here. (Br. 1, 3.) The contention is that if more than Section 2410 is needed for jurisdiction, it is provided by the three additional sections above mentioned. (Br. 12-13.) We submit that this contention is without merit.

In the first place, this issue was neither alleged in the appellant's complaint in the District Court (R. 3-28), nor is it shown by the appellant to have been presented to or considered by the court below (R. 29-32). Hence, the District Court had no basis or occasion to pass on it. Neither was this point assigned as error by the appellant upon appeal (Br. 2) nor included in its statement of points in-

tended to be relied on upon appeal (R. 35). Accordingly, this Court is not called upon to decide the issue but rather, under the authorities, is duty bound to pass it. *Helvering* v. *Salvage,* 297 U.S. 106; *General Utilities Co.* v. *Helvering,* 296 U.S. 200, 206; *Harvey* v. *Commissioner,* 171 F. 2d 952, 955 (C.A. 9th); *Popular Price T. Co.* v. *Commissioner,* 33 F. 2d 464 (C.A. 7th); *Hanby* v. *Commissioner,* 67 F. 2d 125 (C.A. 4th).

Next, if this Court should nevertheless decide to consider the issue, the following is submitted. From the jurisdiction of federal courts to render declaratory judgments, judgments with respect to federal taxes are specifically excepted under 28 U.S.C., Section 2201 (Appendix A, *infra*). Nor would the court below have had jurisdiction under the provisions of 28 U.S.C., Section 2410, even if supplemented by Sections 1346(a)(2) and/or 2463, as claimed by the appellant. (Br. 1, 3, 12-13). Section 1346(a)(2) gives the District Courts jurisdiction of any *other* civil action—than one against the United States for the recovery of any internal revenue tax, penalty, etc., alleged to have erroneously or illegally assessed or collected, within specified amounts, under subdivision (a)(1) thereof—or claim against the United States, within specified amounts, founded either upon the Constitution or any Act of Congress enacted thereunder, etc. Section 2463 provides that all property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United

States having jurisdiction thereof. It is clear that if the District Court here had had jurisdiction under those sections, then it would have had jurisdiction to enjoin the collection of internal revenue taxes, which is strictly prohibited by Section 7421 of the 1954 Code. (Appendix A, *infra.*) And it would also have had jurisdiction to declare judgments in respect of federal taxes which, as pointed out, is specifically excepted from the statute (28 U.S.C., Section 2201) providing for declaratory judgments.

In *Noland* v. *Westover,* 172 F. 2d 614, this Court, affirmed the action of the District Court in granting the Collector's motions for summary judgments of dismissal of the taxpayer's suit for an injunction against the Commissioner, holding (p. 615) that upon relief being asked for a declaratory judgment, the District Court has no jurisdiction, under 28 U.S.C., Section 2201, to render such judgment in controversies in respect of tax problems in favor of the taxpayer. And as the Seventh Circuit said in *Tomlinson* v. *Smith,* 128 F. 2d 808, in this connection (p. 811)—

> * * * it is our view that the language which excepts federal taxes from the Declaratory Judgment Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining the assessment or collection of a tax.

In *Filipowicz* v. *Rothensies,* 31 F. Supp. 716 (E.D. Pa.), the District Court granted the Government's motion to dismiss the plaintiff's petition for a declaratory judgment adjudicating the question of ownership of the distributions made by the bankrupt

estate, the Government and the plaintiff claiming title by virtue of a tax lien and an alleged prior assignment from the bankrupt, respectively. The court stated (p. 721) that if it was at all possible for the United States to have acquired a lien prior to the assignment in question, the complaint must be dismissed for failure to have alleged that such a lien actually was not established.[14] Likewise, the appellant's complaint here failed to allege that a lien, though possible for the United States to have acquired prior to the taxpayer's assignment of its property to the appellant for the benefit of its creditors, actually was not established here (R. 3-34), and therefore the complaint was properly dismissed (R. 31-32).[15]

The appellant complains that the funds now in its hands are as effectively detained as if the Director had them in his possession, and since it can not disburse them to the taxpayer's creditors until the Director's levy is lifted, Section 2463 provides addi-

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[14] In the later case between the same parties after amendment to the complaint (43 F. Supp. 619 (E.D. Pa.)) and additional intervention was granted when the court rendered a declaratory judgment in favor of the Collector, holding the United States an unnecessary party, the court ruled (p. 622), upon the authority of *Rothensies* v. *Ullman,* 110 F. 2d 590, 592 (C.A. 3d), that 26 U.S.C., Section 3653, does not operate to deprive the District Courts of the United States "of jurisdiction to restrain revenue officers from illegally collecting taxes out of property which does not belong to the person indebted to the government".

[15] In fact, the record discloses that the Government is asserting a lien for taxes for a period (calendar quarter ended March 31, 1953) during which the taxpayer was operating its business and before the taxpayer's assignment to the appellant in lieu of foreclosure was made. Compare *United States* v. *Lankford,* 3 F. 2d 52 (E.D. Va.).

tional jurisdiction if more than that provided by Section 2410 is needed, citing, as "A case [allegedly] in point", *Gerth* v. *United States,* 132 F. Supp. 894 (S.D. Calif.). (Br. 12.) There the District Court held that it had jurisdiction of the non-taxpayer's action to quiet title to property allegedly taken from his possession by the taxpayers and subsequently acquired by the Government as security for the taxpayer's taxes, and that the court could enter whatever judgment was required, not only against the Government and its officers but also against the taxpayers. Thus, this case, far from being in point, is merely another example of the many cases cited by the appellant, all of which, as pointed out, involved the question of whether the property upon which the Collector had distrained was the property of the taxpayer or the property of another, and does not touch the question involved here, as heretofore shown.

Finally, under 28 U.S.C., Section 1340, the District Courts have jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. The appellant contends that the provisions of that section will suffice, if more than Section 2410 is needed to supply jurisdiction here, at least where taxes of any kind are involved, citing *Colorado Milling & Elevator Co.* v. *Glenn,* 118 F. Supp. 943 (Ky.). (Br. 12-13.) There the plaintiff Colorado Milling and Elevator Company, the third party claimant which claimed ownership of the property (funds in bank) seized under a warrant of distraint for the payment of the tax liability of taxpayer Koehler-Spalding Company, was allowed to sue the

Director to recover the property levied upon by the United States for the tax claim against the taxpayer, the plaintiff's consignee, which the court held was the real owner of the property seized rather than a mere agent or factor of the third party claimant as claimed by the latter. Thus, that case, like the many others cited by the appellant, involved the question whether the property (funds deposited in the bank) levied upon and seized was the property of the taxpayer or was the property of another, the third party claimant —not the question presented in the instant case— and it is to be noted that the court there found that they belonged to the taxpayer, and that the Collector's action was proper. Hence, that case clearly does not help the appellant. Rather, appellant's proper recourse was—and still is—to pay over upon demand and sue to recover under Section 1340, as heretofore pointed out. (See fn. 10, *supra.*)

In view of the foregoing, we submit that the District Court did not err in holding that it did not have jurisdiction of this suit praying that the Director's levies be removed from the insolvent taxpayer's property, assigned to the appellant for the benefit of its creditors, in which the appellant disclaims any interest.

CONCLUSION

The judgment (order of dismissal) of the District Court is correct and should therefore be affirmed upon review by this Court.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
A. F. PRESCOTT,
S. DEE HANSON,
Attorneys,
Department of Justice,
Washington 25, D. C.

CHARLES P. MORIARTY,
United States Attorney.

EDWARD J. MCCORMICK, JR.,
Assistant United States Attorney.

June, 1956.

APPENDIX A

28 U.S.C.:

§ 1340. *Internal revenue, customs duties*

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§ 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * *

§ 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2410. *Actions affecting property on which United States has lien*

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. * * *

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first

lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

§ 2463. *Property taken under revenue law not repleviable*

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Revised Statutes:

> Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Internal Revenue Code of 1939:

> SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.
>
> (a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.
>
> (b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the

collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) *Person Defined.*—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1952 ed., Sec. 3710.)

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) *Liability of Transferee or Fiduciary.*—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

(26 U.S.C., 1952 ed., Supp. II, Sec. 7421.)

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Civil No. 3992

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *Defendant.*

STATE OF WASHINGTON
COUNTY OF KING } ss.

THOMAS R. WINTER, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant in the above-entitled action;

That on or about October 5, 1954, the plaintiff above named brought an action against William E. Frank, District Director of Internal Revenue for the District of Alaska and Washington, entitled "Seattle Association of Credit Men, a corporation, Plaintiff, vs. William E. Frank, Director of Internal Revenue for the District of Alaska and Washington, and the United States of America, Defendants", Civil No. 1840, which action was brought in the Southern Division of this Court;

That the allegations contained in each and every paragraph of the complaint and amended complaint of cause of action No. 1840, referred to above, are identical with each and every allegation contained in the paragraphs of this action, with the exception of paragraphs Nos. XVI and XVII [in amended complaint filed May 9, 1955, same as pars. XIV and XV in

original complaint filed October 5, 1954] of cause of action No. 1840, which read as follows:

"XVI. [XIV]

Defendant is empowered by virtue of the Internal Revenue Laws of the United States to make a seizure of the property in the hands of the plaintiff and the National Bank of Commerce. If such seizure is made, the creditors of Western Appliance Co., Inc., who have filed claims with the plaintiff, will be unjustly and improperly deprived of moneys belonging to them. The refusal of defendant to release said levies has already caused substantial injury to said creditors in that dividends have been tied up, thereby depriving said creditors of working capital. Plaintiff has also been damaged in that the creditors it represents has lost confidence in the ability of plaintiff to effect an orderly and speedy liquidation of the assets covered by the trust mortgage.

"XI.

No adequate legal remedy exists to try title to said funds, and plaintiff has exhausted all administrative remedies available. Unless the defendant is restrained permanently from enforcing said levies, further damage will ensue to the plaintiff and to the creditors who have filed claims with the plaintiff.

WHEREFORE, plaintiff prays that the defendant, his successors and employees, be permanently enjoined from enforcing the levies hereinabove referred to."

That the defendant William E. Frank in cause of action No. 1840 filed a motion to dismiss the action, and

on April 29, 1955, the Honorable George H. Boldt, one of the judges of the above-entitled Court, granted the defendant's motion for dismissal and entered an order thereon; that attached hereto and made a part hereof is a copy of the memorandum opinion of the Court, not yet officially reported but which may be found at paragraph 72,784 of 1955 Prentice-Hall Federal Tax Service [now reported in 134 F. Supp. 439];

That subsequently, and on or about May 19, 1955, the plaintiff caused to be served on the United States Attorney and the Attorney General of the United States of America, a copy of a summons with an amended complaint in cause of action No. 1840. The so-called amended complaint was a continuation of the old action although the order entered by the Court on April 29, 1955, did not grant the plaintiff leave to plead over. The amended complaint differed from the previous complaint only in that the United States of America was made a party and the plaintiff prayed that if the injunctive relief could not be granted upon it, that the plaintiff have alternate relief against the United States of America under Title 28, U.S.C.A., Sec. 2410, by treating the action as one to remove a cloud upon title;

That the defendants William E. Frank and the United States of America filed a motion to dismiss the the complaint, as amended [filed on or about May 9, 1955], and subsequently, and on or about August 16, 1955, the plaintiff filed a Notice of Dismissal of that action, which Notice of Dismissal reads as follows:

> The plaintiff, Seattle Association of Credit Men, herewith gives notice of dismissal of the above entitled action before service of Answer by the defendants, said dismissal to be without prejudice.

That the relief now sought by the plaintiff in the pending action is between the same parties and is the same primary relief sought by the plaintiff in the action, No. 1840, which was dismissed.

/s/ THOMAS R. WINTER

SUBSCRIBED AND SWORN to before me this [on or about 14th] day of November, 1955.

.....

Notary Public in and for the State of Washington, residing at Seattle

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